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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 KEITH ANJOYOUS DUNN,

8 Plaintiff,

9 v.

10 ALBERTSONS, et al.,

11 Defendants.

Case No. 2:16-cv-02194-GMN-PAL

ORDER

(IFP Application – ECF No. 1)

12 This matter is before the court on Plaintiff Keith Anjoyous Dunn’s Application to Proceed
13 *In Forma Pauperis* (ECF No. 1) pursuant to 28 U.S.C. § 1915 and LSR 1-1 of the Local Rules of
14 Practice. This Application is referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and
15 LR IB 1-3 of the Local Rules of Practice.

16 **I. IN FORMA PAUPERIS APPLICATION**

17 Mr. Dunn is proceeding in this action *pro se*, which means that he is not represented by an
18 attorney. *See* LSR 2-1. Pursuant to 28 U.S.C. § 1915 and LSR 1-1, any person who is unable to
19 prepay the fees in a civil case may apply to the court for authority to proceed *in forma pauperis*
20 (“IFP”), meaning without prepaying the full \$400 filing fee. Here, Dunn has requested authority
21 to proceed IFP and submitted the affidavit required by § 1915(a) showing that he is unable to
22 prepay fees and costs or give security for them. Accordingly, his request to proceed IFP will be
23 granted and the court will review the complaint (ECF No. 1-1).

24 **II. SCREENING THE COMPLAINT**

25 Pursuant to § 1915(e), federal courts must screen all IFP complaints prior to a responsive
26 pleading. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (§ 1915(e) applies to “all
27 in forma pauperis complaints”). If the court determines that the complaint states a valid claim for
28 relief, the court will direct the Clerk of the Court to issue summons to the defendant(s) and the

1 plaintiff must then serve the summons and complaint within 90 days. *See* Fed. R. Civ. P. 4(m). If
2 the court determines that the complaint fails to state an actionable claim, the complaint is dismissed
3 and the plaintiff is ordinarily given leave to amend with directions as to curing the pleading
4 deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be
5 cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

6 Allegations in a *pro se* complaint are held to less stringent standards than formal pleading
7 drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Hebbe v. Pliler*, 627 F.3d 338,
8 342 n.7 (9th Cir. 2010). However, *pro se* litigants “should not be treated more favorably than
9 parties with attorneys of record,” *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986); rather,
10 they must follow the same rules of procedure that govern other litigants. *Ghazali v. Moran*, 46
11 F.3d 52, 54 (9th Cir. 1995).

12 **A. Mr. Dunn’s Factual Allegations and Claims for Relief**

13 The Complaint (ECF No. 1-2) names as defendants Albertsons, a grocery store in Las
14 Vegas, and four “John Doe” employees of Albertsons. Mr. Dunn alleges that on May 20, 2016,
15 he visited Albertsons to shop for groceries and he had a duffel bag in his possession. Four
16 Albertsons employees of Mexican decent confronted him asking him what was inside his duffel
17 bag. They accused Dunn of stealing from the store on numerous occasions and told him that he
18 looked weird and was up to something. Mr. Dunn denied stealing anything and told the store
19 employees to call law enforcement. He felt they were making false accusations and discriminating
20 against him based on his color. The manager called the police and misrepresented Dunn as
21 someone who was stealing, non-compliant, and refusing to leave the store.

22 When the police arrived, an officer aggressively detained Mr. Dunn then spoke with a store
23 security employee about what happened. Dunn was taken outside in handcuffs and instructed to
24 face the squad car while the store security employee showed the police officer a document stating
25 that Dunn had shoplifted from Albertsons several times. The officer asked Dunn if he could check
26 the duffel bag. The search revealed nothing from the store. Angered by the incident, Mr. Dunn
27 yelled at the store security employee that he wanted to beat him up. The police arrested Dunn for
28 harassment and took him to jail where he served 28 days in solitary confinement on suicide watch.

1 Mr. Dunn alleges that defendants were the cause of his incarceration.

2 The complaint alleges claims under Title II of the Civil Rights Act of 1964, 42 U.S.C.
3 § 2000a *et seq.*, and NRS 651.070, which both address discrimination in public accommodations.
4 Dunn seeks punitive and emotional distress damages as well as injunctive relief.

5 For the reasons discussed below, the court finds that the complaint fails to state a claim
6 upon which relief can be granted and Mr. Dunn will be given leave to amend.

7 **B. Legal Standard**

8 Federal courts are required to dismiss an IFP action if the complaint fails to state a claim
9 upon which relief may be granted, is legally “frivolous or malicious,” or seeks monetary relief
10 from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). In determining whether
11 a complaint is frivolous and therefore warrants complete or partial dismissal, a court is not bound
12 “to accept without question the truth of the plaintiff’s allegations.” *Denton v. Hernandez*, 504 U.S.
13 25, 32 (1992). Allegations are frivolous when they are “clearly baseless” or lack an arguable basis
14 in law and fact. *Id.*; *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolous claims
15 include those based on legal conclusions that are untenable (*e.g.*, claims against defendants who
16 are immune from suit or claims of infringement of a legal interest that clearly does not exist), as
17 well as claims based on fanciful factual allegations (*e.g.*, fantastic or delusional scenarios).
18 *Neitzke*, 490 U.S. at 327–28; *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). The standard
19 for determining whether a plaintiff fails to state a claim upon which relief can be granted under
20 § 1915 is the same as the standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure¹
21 for failure to state a claim. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). A district
22 court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be
23 granted.” Fed. R. Civ. P. 12(b)(6). Review under Rule 12(b)(6) is essentially a ruling on a question
24 of law. *N. Star Intern. v. Ariz. Corp. Comm’n*, 720 F.2d 578, 580 (9th Cir. 1983).

25 A properly pled complaint must provide “a short and plain statement of the claim showing
26 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *accord Bell Atlantic Corp. v. Twombly*,
27 550 U.S. 544, 555 (2007). The simplified pleading standard set forth in Rule 8(a) applies to all

28 ¹ Any reference to a “Rule” or the “Rules” in this Order refer to the Federal Rules of Civil Procedure.

1 civil actions with limited exceptions. *Alvarez v. Hill*, 518 F.3d 1152, 1159 (9th Cir. 2008).
2 Although Rule 8 does not require detailed factual allegations, it demands “more than labels and
3 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,
4 556 U.S. 662, 678 (2009) (citation omitted). Mere recitals of the elements of a cause of action
5 supported only by conclusory allegations do not suffice. *Iqbal*, 556 U.S. at 679–80. A complaint
6 “must contain sufficient allegations of underlying facts to give fair notice and to enable the
7 opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).
8 Where the claims in the complaint have not crossed the line from plausible to conceivable, the
9 complaint should be dismissed. *Twombly*, 550 U.S. at 570. Stated differently, the factual
10 allegations “must plausibly suggest an entitlement to relief, such that it is not unfair to require the
11 opposing party to be subjected to the expense of discovery and continued litigation.” *Starr*, 652
12 F.3d at 1216.

13 C. Analysis

14 1. The Public Accommodations Act

15 Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (the “Public
16 Accommodation Act” or the “Act”), prohibits discrimination and segregation on the ground of
17 race, color, religion, or national origin in facilities principally engaged in selling food for
18 consumption on the premises, and in gasoline stations. *Daniel v. Paul*, 395 U.S. 298, 307–08
19 (1969). To state an actionable discrimination claim under the Act, a plaintiff must allege that he
20 or she: (1) is a member of a protected class; (2) attempted to exercise the right to full benefits and
21 enjoyment of a place of public accommodations; (3) was denied those benefits and enjoyment; and
22 (4) was treated less favorably than similarly situated persons who are not members of the protected
23 class. *See, e.g., United States v. Lansdowne Swim Club*, 894 F.2d 83, 88 (3d Cir. 1990).

24 Here, the Complaint (ECF No. 1-2) fails to allege sufficient facts to state a claim for public
25 accommodation discrimination. Mr. Dunn alleges that defendants made false accusations against
26 him and discriminated against him based on his color. The allegations indicate that Dunn
27 attempted to exercise the right to full benefits and enjoyment of Albertsons and was denied those
28 benefits and enjoyment by Albertson’s employees. However, he does not allege that he was treated

1 less favorably than similarly situated persons who are not members of the protected class. For
2 example, in *Slocumb v. Waffle House, Inc.*, 365 F. Supp. 1332 (N.D. GA. 2005), an African–
3 American family successfully pled that they were treated less favorably than similarly situated
4 persons outside their protected class by pleading that a hostess seated and served several white
5 families similarly situated to plaintiffs prior to seating and serving plaintiffs, despite their arrival
6 at the restaurant first. Mr. Dunn will be given leave to amend.

7 In addition, the complaint does not sufficiently allege that Albertsons meets the statutory
8 definition for “places of public accommodation.” As defined in the statute, the following
9 establishments are places of public accommodation:

10 (1) any inn, hotel, motel, or other establishment which provides lodging to transient
11 guests, other than an establishment located within a building which contains not
12 more than five rooms for rent or hire and which is actually occupied by the
13 proprietor of such establishment as his residence;

14 (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other
15 facility principally engaged in selling food for consumption on the premises,
16 including, but not limited to, any such facility located on the premises of any retail
17 establishment; or any gasoline station;

18 (3) any motion picture house, theater, concert hall, sports arena, stadium or other
19 place of exhibition or entertainment; and

20 (4) any establishment (A)(i) which is physically located within the premises of any
21 establishment otherwise covered by this subsection, or (ii) within the premises of
22 which is physically located any such covered establishment, and (B) which holds
23 itself out as serving patrons of such covered establishment.

24 42 U.S.C. § 2000a(b). Despite the seemingly broad language “affect interstate commerce,” courts
25 have interpreted the definition of places of public accommodation narrowly, generally adhering to
26 the three categories outlined in the statute: lodgings, restaurants, and entertainment facilities. *See,*
27 *e.g., Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 431 (4th Cir. 2006) (finding that the Act
28 “sets forth a comprehensive list of establishments that qualify as a ‘place of public
accommodation’ . . . and in so doing excludes from its coverage those categories of establishments
not listed”). The Ninth Circuit has held that the statute’s plain language represents a clear
Congressional intent to limit the definition of “places of public accommodation.” *Clegg v. Cult
Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (noting that the statute was enacted “to
provide a remedy only for discrimination occurring in facilities or establishments serving the
public: to conclude otherwise would obfuscate the term ‘place’ and render nugatory the examples

1 Congress provides to illuminate the meaning of that term”).

2 A grocery store is not a place of public accommodation under the Public Accommodation
3 Act unless it meets the criteria of subsection (4). *See, e.g., Brown v. Whole Foods Mkt. Grp., Inc.*,
4 965 F. Supp. 2d 132, 138 (D.D.C. 2013) (holding that the complaint sufficiently pled the defendant
5 grocery store was a place of public accommodation by alleging that a “fully functioning restaurant”
6 was operated on the premises), *rev’d in part on other grounds*, 789 F.3d 146 (D.C. Cir. 2015).
7 Here, Albertsons is not an establishment expressly described in subsections (1)–(3). The complaint
8 does not allege facts showing that Albertsons meets the criteria of subsection (4). To state an
9 actionable claim under the Public Accommodation Act, Mr. Dunn must allege that Albertsons
10 meets subsection (4)’s additional criteria.

11 Lastly, the court notes that the complaint does not indicate Dunn has complied with the
12 Act’s notice requirement. The Public Accommodation Act provides:

13 In the case of an alleged act or practice prohibited by this subchapter which occurs
14 in a State . . . which has a State or local law prohibiting such act or practice and
15 establishing or authorizing a State or local authority to grant or seek relief from
16 such practice . . . upon receiving notice thereof, *no civil action may be brought
under subsection (a) of this section before the expiration of thirty days after written
notice of such alleged act or practice has been given to the appropriate State or
local authority by registered mail or in person . . .*

17 42 U.S.C. § 2000a–3(c) (emphasis added). Therefore, if the state in which the alleged civil rights
18 violation occurred has established an agency with authority to hear complaints of discrimination
19 prohibited by the Public Accommodation Act, a plaintiff must give notice of the violation to the
20 appropriate state agency. *See Boyle v. Jerome Country Club*, 883 F. Supp. 1422, 1425–26 (D.
21 Idaho 1995) (citing *Stearnes v. Baur’s Opera House, Inc.*, 3 F.3d 1142, 1144–45 (7th Cir. 1993));
22 *see also Bilello v. Kum & Go, LLC*, 374 F.3d 656, 658–59 (8th Cir. 2004); *Watson v. Fraternal*
23 *Order of Eagles*, 915 F.2d 235, 242 (6th Cir. 1990). The State of Nevada has created a state agency
24 for the purpose of protecting human rights: the Nevada Equal Rights Commission (“NERC”). In
25 NRS 233.010(2), the legislature declared that the public policy of the State of Nevada is

26 to protect the welfare, prosperity, health and peace of all the people of the State,
27 and to foster the right of all persons reasonably to seek and be granted services in
28 places of public accommodation without discrimination distinction or restriction
because of race, religious creed, color, age, sex, disability, sexual orientation,
national origin, ancestry or gender identity or expression.

1 To enforce this policy, NERC was created with the authority to investigate and conduct hearings
2 regarding “tensions, practices of discrimination and acts of prejudice” against any protected person
3 or group. NRS 233.150(a). Pursuant to the notice requirement of the Public Accommodation Act,
4 Mr. Dunn must provide notice to NERC of his claim before filing suit.

5 2. Supplemental Jurisdiction for State Law Claim

6 Federal courts are courts of limited jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs.,*
7 *Inc.*, 545 U.S. 546, 552 (2005). A court’s jurisdiction to resolve a case on its merits requires a
8 showing that the plaintiff has both subject matter and personal jurisdiction. *Ruhrgas AG v.*
9 *Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Subject matter jurisdiction gives a court jurisdiction
10 over the *type of case* that a plaintiff brings. Federal district courts have original jurisdiction over
11 “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.
12 § 1331. When a plaintiff states an actionable claim under federal law, district courts have
13 supplemental jurisdiction over all claims in the case that are so related to claims providing original
14 jurisdiction that they form part of the same case or controversy. 28 U.S.C. § 1367(a).

15 Jurisdiction in this case is purportedly based on this court’s original jurisdiction over Mr.
16 Dunn’s discrimination claim pursuant to the Public Accommodation Act, a federal law. However,
17 the remaining claim arises under Nevada state law. Because Mr. Dunn’s allegations fail to state
18 an actionable federal claim, the court necessarily cannot exercise supplemental jurisdiction over
19 his state-law claim. 28 U.S.C. § 1367(a) (“[I]n any civil action *of which the district courts have*
20 *original jurisdiction*, the district courts shall have supplemental jurisdiction”) (emphasis added);
21 *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001) (“The statute’s
22 plain language makes clear that supplemental jurisdiction may only be invoked when the district
23 court has a hook of original jurisdiction on which to hang it.”).

24 III. AMENDING THE COMPLAINT

25 If Mr. Dunn chooses to file an amended complaint, he must do so by **September 10, 2017**.
26 The amended complaint must contain a short and plain statement of: (1) the grounds for the court’s
27 jurisdiction; (2) any claim he has showing he is entitled to relief; and (3) a demand for the relief
28 he seeks. *See* Fed. R. Civ. P. 8(a). The amended complaint should set forth the claims in short

1 and plain terms, simply, concisely, and directly. *See Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506,
2 514 (2002). This means that Dunn should avoid legal jargon and conclusions. Instead, he should
3 summarize the information they believe to be relevant in their own words for each claim asserted
4 in the amended complaint. *Iqbal*, 556 U.S. at 678.

5 Mr. Dunn is advised to support each of his claims with factual allegations because all
6 complaints must contain sufficient factual allegations “to give fair notice and to enable the
7 opposing party to defend itself effectively.” *Starr*, 652 F.3d at 1216. When claims are alleged
8 against multiple defendants, the complaint should clearly indicate which claims apply to which
9 defendant. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1995). Mr. Dunn should specifically
10 identify each defendant to the best of his ability, clarify what right he believes each defendant
11 violated and support each claim with factual allegations about each defendant’s actions. Where
12 multiple claims are alleged, the complaint should identify which factual allegations give rise to
13 each particular claim. *McHenry*, 84 F.3d at 1178. A plaintiff must state “enough facts to raise a
14 reasonable expectation that discovery will reveal evidence” of the allegations charged. *Cafasso*,
15 *United States ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
16 (quoting *Twombly*, 550 U.S. at 556).

17 Mr. Dunn is also informed that the court cannot refer to a prior pleading (*i.e.*, the original
18 complaint) in order to make the amended complaint complete. Local Rule 15-1 requires that an
19 amended complaint be complete in itself without reference to any prior pleading. *See* LR 15-1(a).
20 This is because, as a general rule, an amended complaint supersedes the original complaint.
21 *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). Once a plaintiff files
22 an amended complaint, the original pleading no longer serves any function in the case. *Ferdik v.*
23 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Therefore, in an amended complaint, as in an
24 original complaint, each claim and the involvement of each defendant must be sufficiently alleged.

25 Lastly, the court notes that plaintiffs are required to provide a mailing address in order to
26 receive notice of case filings from the Clerk of the Court. The Local Rules require pro se parties
27 immediately file with the court written notification of any change of mailing address, email
28 address, or telephone number. *See* LR IA 3-1; LSR 2-2; *see also Carey v. King*, 856 F.2d 1439,

1 1441 (9th Cir. 1988) (“A party, not the district court, bears the burden of keeping the court apprised
2 of any changes in his mailing address.”). Failure to do so “may result in dismissal of the action,
3 entry of default judgment, or other sanctions.” LR IA 3-1. None of Mr. Dunn’s papers contain a
4 residential address. His complaint states he lives in Las Vegas, Nevada in zip code 89108. He
5 did, however, provide an email address. Thus, the Clerk of the Court will be instructed to serve
6 this Order at the email address listed on the Complaint.

7 Based on the foregoing,

8 **IT IS ORDERED:**

- 9 1. Plaintiff Keith Anjoyous Dunn’s Application to Proceed *In Forma Pauperis* (ECF
10 No. 1) is **GRANTED**.
- 11 2. Mr. Dunn is permitted to maintain this action to conclusion without the necessity of
12 prepayment of any additional fees or costs or the giving of a security therefor. This
13 Order granting leave to proceed *in forma pauperis* shall not extend to the issuance or
14 service of subpoenas at government expense.
- 15 3. The Clerk of the Court SHALL FILE the Complaint (ECF No. 1-2) but ***SHALL NOT***
16 issue summons.
- 17 4. The Clerk of Court SHALL SERVE this Order at the email address listed on the
18 Complaint.
- 19 5. Mr. Dunn’s Complaint is DISMISSED with leave to file an amended complaint by
20 **September 10, 2017**, if he believes he can correct the noted deficiencies.
- 21 6. The amended complaint must be a complete document in and of itself and will
22 supersede the original complaint in its entirety. Any allegations, parties, or requests
23 for relief from prior papers that are not carried forward in the amended complaint will
24 no longer be before the court.
- 25 7. Mr. Dunn shall clearly title the amended complaint as such by placing the words
26 “FIRST AMENDED COMPLAINT” on the first page and write 2:16-cv-02194-GMN-
27 PAL as the case number.

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1 8. Mr. Dunn's failure to comply with this Order before the **September 10, 2017** deadline
2 will result in a recommendation to the district judge that this case be dismissed.

3 Dated this 10th day of August, 2017.

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5 PEGGY A. LEEN
6 UNITED STATES MAGISTRATE JUDGE
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